145-335 R.

RECORD, CASE No. 13,525.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 344.

ELIZABETH BARTON, APPELLANT,

vs.

SAMUEL S. BROWN AND HARRY BROWN, CLAIMANTS OF THE STEAM-TUG "CORSAIR."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED MARCH 30, 1889.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

E. S. BARTON *et al.*, Appellants,
versus
STEAM-TUG CORSAIR, Appellee. } No. 11762.

R. De Gray and F. C. Zacharie, Esquires, for appellants; Hornor & Lee, Esquires, for appellee.

Appeal returnable to the Supreme Court of the United States of America, at the city of Washington, D. C., on the second Monday of October, A. D. 1889.

Transcript of Appeal.

1 UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

Proceedings in the United States District Court.

E. S. BARTON & *al.*
vs.
STEAM-TUG CORSAIR. } No. 12567.

Libel. Filed April 5th, 1888. In Admiralty.

To the judge of the district court of the United States for the eastern district of Louisiana:

Edward S. Barton and Elizabeth Barton, his wife, herein duly authorized by her husband and by him assisted, of the city of New Orleans, State of Louisiana, against The Steam-Tug Corsair, now lying within the admiralty and maritime jurisdiction of this hon. court, her boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interests therein in a cause of collision and damage, civil and maritime; and thereupon the parties aforesaid do allege and articulately propound as follows, to wit:

2 First. That at the time hereinafter named they were the parents of Ella Barton, then a minor child of 16 years and of sound mind and good health; said Edward S. Barton — the stepfather, Mrs. Elizabeth Barton being the mother, said Ella being a daughter by a former marriage with John Delery, deceased.

Third. That on or about the 13th day of April, 1887, said steam-tug Corsair, whereof L. B. McNeely was acting master, being then in the port of New Orleans, at about 8 o'clock p. m., steamed from the New Orleans side of the Mississippi to Algiers, on the opposite side or the right bank of said river, and there took on board twenty passengers, including said Ella Barton, beside her officers and crew,

and proceeded up said river with them for about 7 miles and landed them on the left bank of said river at the Exposition wharf, where said passengers went ashore.

Fourth. That said passengers, including said Ella Barton, remained on shore until on or about 10 o'clock of the morning of the 14th day of April, 1887, when they all, including said Ella Barton, again embarked on said tug and started down said river for Algiers aforesaid, and after proceeding on said down trip for about one mile said steam-tug, through the carelessness, negligence, improper conduct, and utter incompetence of the officers and crew of said tug, was run at full speed into the right bank of said river, at a point about 400 yards above the Ames plantation wharf, and with such violence that she filled with water and sunk in about ten minutes, as libellants have been informed.

3 Fifth. That by and through the continuous negligence and improper conduct of said officers and crew of said tug as aforesaid, in running her into the bank as aforesaid, as well as by their carelessness, negligence, and want of attention and skill after said tug struck said bank as aforesaid, their daughter, Ella Barton, passenger on said tug as aforesaid, suffered the agony of death and was drowned.

Sixth. That at and during the aforesaid trip said steam-tug was improperly and insufficiently manned, was incompetent and unseaworthy, not having on board a sufficient number of officers and crew, nor of sufficient experience and skill, and not being sufficiently supplied with lifeboats and life-preservers and life-saving apparatus; all of which, as libellants believe, contributed to the death of their aforesaid daughter; and said tug was, moreover, carrying more than ten persons allowed by her license and the law.

Seventh. That from the time said tug struck the bank of the river to the time she sunk and the said Ella Barton was drowned she, said Ella Barton, suffered great mental and physical pains and shock and endured the tortures and agonies of death, and the right of action for the recovery for said pains, sufferings, and shock survive in consequence of the death of said Ella Barton, who died unmarried and without children, to libellants, her father and mother, under article No. 2375 of the Civil Code and the laws and jurisprudence of the State of Louisiana, and they are entitled to damages therefor in the full sum of $10,000.

4 Eight. That by the untimely and cruel death of their said daughter through the carelessness, negligence, want of proper skill of the officers and crew of said tug, as well as the want of necessary and proper boats, life-preservers, and life-saving apparatus on board of said tug, libellants, her surviving father and mother, have been deprived of her society, companionship, and support and been damaged thereby in the further sum of $10,000, and the right to recover therefor is further given to libellants by the aforesaid article of said Civil Code of Louisiana as amended by act of the legislature of Louisiana passed in 1884, as well as by the general admiralty law.

Ninth. That all and singular the premises are true.

Wherefore libellants pray that process in due form of law according to the course of this hon. court in cases of admiralty and maritime jurisdiction may issue against the said steam-tug Corsair, her tackle, apparel, and other furniture, and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this hon. court will be pleased to decree the payment of the damages aforesaid, with costs, and that the libellant- may have such other and further relief and redress as in law and justice they may be entitled to receive.

E. S BABTON.
ELIZABETH BARTON.

RICH. DE GRAY &
F. C. ZACHARIE,
Proctors for Libellants.

Sworn to and subscribed before me this 5 April, 1888.

J. DEVONSHIRE,
U. S. Com'r.

5 Let admiralty process issue as prayed for.
April 5, 1888.

K. LOEW, *D'y Cl'k.*

Admiralty Warrant.

The President of the U. S. of America to the marshal of the eastern district of La. or to his lawful deputy, Greeting:

You are hereby commanded forthwith to seize and into your possession take the steam-tug Corsair, now libelled by E. S. Barton & *al.*, for the causes set forth in the libel now pending in the district court of the U. S. for the eastern district of Louisiana; that you do cite and admonish the owner or owners and all and every other person or persons having or pretending to have any right, title, or interest in or to the same to be and appear before a district court of the United States for the district aforesaid to be holden at the city of New Orleans on or before the 3rd Monday from the service hereof to show cause, if any they have or can, why the said steam-tug should not be condemned and sold agreeably to the prayer of libellant-, and how you have executed this warrant that you make due return according to law.

Witness the Hon. Edward C. Billings, judge of said court, at New Orleans, this 5th day of April, 1888, and the 112 year of the
6 Independence of the United States.

[SEAL.] K. LOEW, *D'y Cl'k.*

Marshal's Return.

Received by the U. S. marshal April 5th, 1888, and on the same day I seized and took into my possession the tug Corsair and placed a keeper on board and so held custody and control until on the

same day, claimant having filed bond, said vessel was released and restored to said claimant.

Ret'd same day.

R. B. PLEASANTS,
U. S. Marshal.
By W. B. LOGAN, *D'y M'l.*

Release Bond.

UNITED STATES OF AMERICA, }
Eastern District of Louisiana. }

Know all men by these presents that we, Samuel S. Brown and Harry Brown, of Pittsburgh, Pennsylvania, by Geo. F. Rootes, their duly authorized agent, claimants and owners of the steam-tug Corsair, as principal-, and James Sweeney, as surety, are held and
7 firmly bound unto Edward S. Barton and Elizabeth Barton, libellants, in the sum of twenty-five thousand dollars, lawful money of the United States of America; for the payment whereof to the said libellants, their heirs, executors, administrators, or assigns, we jointly and severally bind ourselves, our heirs, executors, and administrators firmly by these presents.

Witness our respective names and seals hereunder affixed by us, at New Orleans, this 5th day of April, one thousand eight hundred and eighty-eight.

Whereas an admiralty warrant was lately issued out of the honorable the district court of the United States of America for the eastern district of Louisiana, at the suit of E. S. Barton & *al. vs.* Steam-Tug Corsair, her tackle, apparel, and furniture, and numbered 12567 on the docket of the said court, commanding the marshal to seize and take in his possession the said steam-tug, which has been seized accordingly, but has been released from said seizure and delivered to George F. Rootes, the authorized agent of the owners thereof, by reason of the signing, sealing, and delivery of these presents, said claimant- having obtained leave of court to bond said property, and filed a claim thereto, which is now of record in the clerk's office of this court:

Now, the condition of the above obligation is such that if said claimant- and suret- abide by all the orders, interlocutory or final, of the court and pay the said libellants the amount awarded by the final decree rendered in the court to which the process is returnable or in any appellate court, then the foregoing obligation is to
8 be void, but otherwise shall remain in full force and virtue.

GEORGE F. ROOTIS, [L. S.]
Ag't of SAM'L S. BROWN AND [L. S.]
HARRY BROWN. [L. S.]
J. SWEENEY. [L. S.]

Signed, sealed, and delivered in presence of—

——— ———.

Claim. Filed 5 April, 1888.

EDWARD S. BARTON & *al.*
vs.
STEAM-TUG CORSAIR. } 12567.

Now comes George F. Rootes, who, being duly sworn, — that he is the duly authorized resident agent of Messrs. Sam'l S. Brown and Harry Brown, of Pittsburgh, Pennsylvania, owners of the steam-tug Corsair, libelled herein, and that no other persons have any interest therein, and desires to release her from seizure on giving bond conditioned according to law.

GEORGE F. ROOTES.
Agent of Sam'l Brown and Harry Brown.

Sworn to and subscribed before me this 5 Ap'l, 1888.
J. DEVONSHIRE,
U. S. Com'r.

9 *Exception. Filed April* 21, 1888.

E. S. BARTON & *al.*
vs.
STEAM-TUG CORSAIR. } 12567.

To the Honorable Edward C. Billings, judge of the district court of the U. S. for the eastern district of La.:

Now come Samuel S. Brown and Harry Brown, of Pittsburgh, Pennsylvania, owners of the steam-tug Corsair, claimants herein, and for exception to the libel herein filed against the said steam-tug Corsair plead:

1st. That said libel sets forth no cause of action.

2d. That under the allegations and averments of said libel the said libellants cannot recover for this, that their right of action for damages alleged to have been suffered in said libel perished with the person therein alleged to be deceased, and did not and does not survive, under the law, in favor of libellants or either of them.

3rd. That if there be any cause of action presented by the libel in this case it is not within the admiralty and maritime jurisdiction of this court.

4th. This court has no jurisdiction in the premises.

5th. That if any cause of action is set forth in the libel there is none presented justifying proceedings *in rem.* under the admiralty and maritime jurisdiction of this court.

Wherefore these claimants pray that these exceptions be
10 maintained and said libel be dismissed with costs and for all general relief.

HORNOR & LEE, *Proctors.*

Hearing and Submission of Exception, May 3rd, 1888.

E. S. BARTON & *al.*
vs.
STEAM-TUG CORSAIR. } 12567.

This cause came on to be heard upon the exception to jurisdiction; and, having been argued by the proctors for the respective parties, the court took the matter under advisement.

Judgment on the Exception, May 14, 1888.

E. S. BARTON & *al.*
vs.
STEAM-TUG CORSAIR. } 12567.

This cause came on to be heard upon the exception to the libel and was argued by the proctors; and, the court considering that no action *in rem* lies in this case, it is ordered that the exception
11 be sustained to the extent of releasing the tug Corsair from the seizure made under the admiralty warrant issued in the cause, the court being of the opinion that the statute of Louisiana creates no lien upon the vessel.

Further ordered that libellants be allowed to amend their pleadings and proceed *in personam* against the owners of the vessel within 10 days, if they see fit.

Amended Libel. Filed 15*th May,* 1888.

E. S. BARTON & *al.*
vs.
TUG CORSAIR. } 12567.

In admiralty.

To the judge of the district court of the U. S. for the eastern district of La.:

Edward S. Barton and Elizabeth Barton, his wife, herein duly authorized by her said husband and by him assisted, availing themselves of the order of the court herein sustaining the exception as to proceeding *in rem* and allowing the suit to be amended so as to make it *in personam*, exhibit this their libel against Samuel S. Brown and Harry Brown, of Pittsburgh, Pennsylvania, owners of the steam-tug Corsair, in a cause of collision, tort, and damage, civil and maritime, and amend their original libel accordingly and allege and propound as follows, to wit:

1. That they adopt and reiterate all the allegations contained in their original libel herein filed, except in so far as they may be changed by this their amended libel from an action *in rem*
12 to one *in personam* against the owners of said tug Corsair.

Wherefore libellants pray that process of monition may issue

to the marshal of the district aforesaid commanding him to cite and admonish said Samuel S. Brown and Harry Brown to appear before this hon. court on the — day of ——, or on such other day, to be inserted in the said monition, as the court may direct, then and there to answer the libellants in the premises, and in case the said Samuel S. Brown and Harry Brown shall not be found within the aforesaid district, that then a writ of attachment do issue to the marshal commanding him to attach the goods and chattels, and for want thereof the credits and effects, of the said Samuel S. Brown and Harry Brown, wherever found, and that this hon. court will pronounce for the libellants' aforesaid demand against the said Samuel S. Brown and Harry Brown *in solido* and decree the same to be paid with costs, and for such other and further relief and redress as to right and justice may appertain and as the court is competent to give in the premises.

R. DE GRAY &
F. C. ZACHARIE,
Proctors for Libellants.

Let this amended libel be filed and let attachment process issue as prayed for and according to law.
May 15, 1888.

EDWARD C. BILLINGS, *Judge.*

13 *Writ of Attachment.*

E. S. BARTON & *al.*
vs.
TUG CORSAIR. } 12567.

The President of the U. S. to the marshal of the eastern district of Louisiana or his lawful deputy, Greeting:

You are hereby commanded, in the name of the United States and of our said court, to arrest the bodies of the defendants, Samuel S. Brown and Harry Brown, and if you do not find said defendants in your district that you shall attach their ships, goods, and chattels, and for want thereof their rights, credits, and effects, to the amount of $20,000, wherever found in your district; and of your doings in the premises make due return hereon.

Witness the Honorable E. C. Billings, judge of said court, and the seal thereof, at New Orleans, this 15th day of May, A. D. 1888.

K. LOEW, *D'y Cl'k.*

Marshal's Return.

Rec'd May 15, 1888, by the U. S. marshal, and on the same day, after diligent search and inquiry, the defendants named herein, Samuel Brown and Harry Brown, could not be found within the limits of the eastern district of Louisiana, and I am creditably informed that the said defendants reside permanently out of the afore-

said district; whereupon I did on the same day seize and take
14 into my possession, reference being made to the written notice of seizure and return thereon written, made part of this return, the following-described property as the property of the said defendants, to wit, the steam-tug Corsair, her tackle, apparel, and everything appertaining to said vessel, placed a keeper in charge, and so retained custody until the 17th day of May, 1888, on which day, defendants having filed claim in this hon. court, through their lawful agent and attorney, Geo. F. Rootes, Esq., and given bond with solvent surety in the sum of $25,000 to me, due assignment and transfer being made by me to the plaintiffs herein and the said bond surrendered to the clerk of this hon. court, I made this return on the within writ.

R. B. PLEASANTS,
U. S. Marshal,
By W. B. LOGAN, *D'y.*

Ret. May 23, '88.

Notice of Seizure Annexed.

OFFICE U. S. MARSHAL, E. D. OF LA.,
N. O., *May* 15, 1888.

U. S. D. C't.

E. S. BARTON
vs.
STEAM-TUG CORSAIR. } 12567.

To Tug Corsair:

You are hereby notified that, by virtue of a writ of attachment issued out of the above-named court in the above entitled and numbered case and to me directed, I have this day seized and
15 taken into my possession the following-described property to pay and satisfy the said writ, amounting to the sum of $20,000 or thereabouts:

Description of Property.

The steam-tug Corsair, her engines, tackle, &c., belonging to Sam'l S. Brown and Harry Brown, of Pittsburgh.

W. B. LOGAN,
D'y U. S. Marshal, E. D. of La.

Served same day on board tug Corsair.

Claim. Filed May 16, 1888.

E. S. BARTON & *al.*
vs.
TUG CORSAIR. } 12567.

Now comes George F. Rootes, Esq., who says that he is the resident agent in this city of Sam'l S. Brown and Harry Brown, of Pitts-

burgh, Pennsylvania, sole owners of the tug Corsair, seized herein by virtue of a writ of attachment, and desires to release her from said seizure on giving bond conditioned according to law.

GEO. F. ROOTES,
Ag't Sam'l S. Brown and Harry Brown.

Sworn to and subscribed before me this 16th May, 1888.

J. DEVONSHIRE,
U. S. Com'r.

16 *Attachment Bond. Filed* 16 *May*, 1888.

U. S. OF AMERICA,
Eastern District of Louisiana.

Know all men by these presents that we, Wm. H. Brown & Son, as principal, and James Sweeney, as surety, are held unto R. B. Pleasants, marshal of the U. S. for the eastern district of La., in the penal sum of twenty-five thousand dollars in lawful money of the U. S.; for the payment whereof to the said marshal, his executors, administrators, or assigns, we jointly bind ourselves, our heirs, executors, and administrators respectively, by these presents, as witness our respective names hereto affixed, at New Orleans, this 16th day of May, in the year 1888.

Whereas in and by virtue of a writ of attachment issued out of the hon. the U. S. district court for the eastern district of La., in admiralty, at the libel of E. S. Barton & *al. vs.* Steam-Tug Corsair, and numbered 12567 of the docket of the said court, and which libel is now pending therein, the following-described property, to wit, the steam-tug Corsair, her tackle, engines, &c., &c., has been seized and taken into the custody of the said marshal and detained according to law, but the same has been released and the writ of attachment thereon set aside upon appearance of Wm. H. Brown & Son (Sam'l Brown and Harry Brown), by their agent and attorney, Geo. F. Roots, owners of the tug Corsair, in the suit and delivering to the marshal the present obligation, the condition of which is such that if

17 the said owners of the tug Corsair, Wm. H. Brown & Sons, Sam'l Brown and Harry Brown, shall abide by all orders, interlocutory or final, and pay the amount awarded by the final decree and judgment as may be rendered in the libel pending in the U. S. dist. court aforesaid or any appellate court, then this obligation to be void, or else to be and remain in full force.

W. H. BROWN & SONS,
'Ppr GEO. F. ROOTES, *Principal.*
J. SWEENEY, *Surety.*

Signed in presence of witnesses—

A. B. JOHNSTON.
JOHN BAKER.

Affidavit.

CLERK'S OFFICE, U. S. DIST. COURT, E. D. OF LA.

I, James Sweeney, do solemnly swear that I reside in the parish of Orleans; that I have property in my own right unincumbered and of sufficient value to satisfy amount of within bond; that after paying all my debts and liabilities I am worth over and above the said amount; that there exists no legal impediment to my signing said bond.

J. SWEENEY.

Sworn and subscribed to before me this 16th day of May, 1888.

JOHN DEVONSHIRE,
Clerk U. S. Dist. Court, East. Dist. of La.

U. S. MARSHAL'S OFFICE, EAST. DISTRICT OF LA.,
NEW ORLEANS, *May* 16, '88.

I do hereby transfer, assign, and set over to plaintiff herein
18 all my right, title, and interest in and to the within bond.

R. B. PLEASANTS,
U. S. Marshal, Eastern Dist. of La.

Citation.

E. S. BARTON & *al.*
vs.
STEAM-TUG CORSAIR. } 12567.

The President of the U. S. of America to Samuel S. Brown and Harry Brown, of Pittsburgh:

You are hereby summoned to comply with the demand contained in the libel and amended libel under the order of court, of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the district court of the United States for the eastern district of Louisiana, in the city of New Orleans, in ten days after the service thereof, which delay is increased one day for every 10 miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Hon. Edward C. Billings, judge of said court, at the city of New Orleans, this 15 day of May, 1888, and of the Independence of the United States of America the 112th year.

[SEAL.] K. LOEW, *D'y Cl'k.*

19 *Service.*

Rec'd May 15, 1888. On the 15th day of May, 1888, I served a true copy of the within citation and accompanying copy of libel and supplemental libel and order to amend on Samuel S. Brown and Harry Brown, of Pittsburgh, defendants herein, by leaving the same on board of the steam-tug Corsair, lying at the head of Julia street, in the port of New Orleans, in the hands of Capt. H. P. McNeeley, who informed me

that he is the master in charge of the said steam-tug Corsair, and I am credi*t*ably informed that the said defendants Samuel S. Brown and Harry Brown, owners of said tug Corsair, reside permanently out of the eastern district of Louisiana.

R. B. PLEASANTS,
U. S. Marshal, E. D. of La.
JOHN BAKER, *Dep.*

Exception. Filed May 23, 1888.

E. S. BARTON & *al.*
vs.
TUG CORSAIR. } 12567.

To the Hon. Edward C. Billings, judge of the district court of the U. S. for the eastern dist. of La.

The exception of Samuel S. Brown and Harry Brown, owners of the steam-tug Corsair, to the libel and amended libel herein filed against these appearers and said boat by E. S. Barton and *als.*

20 Now come Samuel S. Brown and Harry Brown, who reside in Pittsburgh, Pennsylvania, and, appearing herein for the sole purpose of excepting to the manner in which they have been summoned to be brought in court in this case, for exception to the libel and amended libel of E. S. Barton & *al.* say:

1st. That due and sufficient process has not been served upon them or upon any one in their behalf duly authorized to receive the same sufficient to oblige them to appear and answer to the complaint made in the libel and amended libel filed by the libellants in this case.

2d. That if any legal warrant of arrest issued in this case, which is denied, against the property of these appearers, the same has so issued for a sum exceeding $500 and the same had no right to so issue, because there was no affidavit or other proper proof showing the propriety thereof, as is required by rule 7 of the admiralty rules for the courts of the United States, laid down by the Supreme Court of the U. S.

3d. That proceedings *in rem* and *in personam* cannot be joined in the same libel in a case of this character, and hence there was no power in the court to allow the libellants to change this suit from a suit *in rem* to a suit *in personam*, and that the same is contrary to the Supreme Court rules in admiralty.

4th. That the cause of action set forth in the original and supplemental libels is barred by the prescription of one year, as appears upon the face of said libels and according to the law of the State of Louisiana.

21 Wherefore these claimants pray that this honorable court will be pleased to pronounce in favor of these exceptions, maintaining the same and dismissing the libel and amended libel herein with costs, to be taxed, and they pray for all general relief.

HORNOR & LEE, *Proctors.*

Hearing and Submission of Exception, November 16, 1888.

E. S. BARTON and WIFE
vs.
STEAM-TUG CORSAIR. } 12567.

The exception herein came on for trial.

R. DeGray, for libellants; Hornor & Lee, for claimants.

And after hearing the pleadings and argument the court took time to consider.

Order: Exception Reinstated for Reargument Nov. 19, 1888.

E. S. BARTON and WIFE
vs.
STEAM-TUG CORSAIR. } 12567.

Ordered that the exception herein be reinstated for reargument on the 22d day of November, 1888, at 11 a. m., and that the proctors be notified.

22 *Hearing and Continuance of Exception, &c., November* 22*d*, '88.

E. S. BARTON and WIFE
vs.
TUG CORSAIR. } 12567.

The exception herein was this day called up for reargument.

Present: R. DeGray and F. C. Zacharie, for libellant-; Hornor & Lee, for exceptors.

When the proctors for the libellants presenting the affidavit sworn to this day by Mrs. Elizabeth Barton, mother of the late Ella Barton, asked the court to allow the same to be filed, which was objected to by claimants; whereupon the court directed the clerk to mark the paper as doc't A for identification and took the matter of the filing thereof as part of the record under consideration.

And after hearing argument on the exception the further hearing is continued till the 29 inst. at 11 a. m.

NOVEMBER 29, '88.

By consent the exception is continued to November 30, 1888.

NOVEMBER 30, 1888.

Hearing and Submission of Exception.

E. S. BARTON & WIFE
vs.
TUG CORSAIR. } 12567.

23 The trial of the exception was this day resumed.

Present: R. DeGray, F. C. Zacharie, and J. P. Hornor.

And after hearing further argument the court took the matter under advisement.

Order to File Affidavit of Elizabeth Barton, Mother of the Late Ella Barton, December 6th, 1888.

E. S. BARTON and WIFE
vs.
TUG CORSAIR. } 12567.

The court this day ordered that the affidavit of Elizabeth Barton, mother of the late Ella Barton, be filed as prayed for.

Affidavit. Filed December 6th, 1888.

E. S. BARTON and ELIZABETH BARTON
vs.
TUG CORSAIR and S. S. BROWN and HARRY BROWN. } 12567.

Mrs. Elizabeth Barton, being duly sworn, deposes and says that she is the mother of the late Ella Barton described in the original libel filed herein, whose life was lost as in said original libel described, to the best of her information and belief, and that all the allegations in said libel are true and correct, as well as those in their said amended libel also filed herein, as she has been informed and believes; and that she is further informed and believes that said Samuel S. Brown and Harry Brown, claimants of said tug
24 Corsair and defendants in said above-described suit, reside beyond the State of Louisiana and in the State of Pennsylvania, and that a writ of attachment is necessary herein.

ELIZABETH BARTON.

Sworn to and subscribed before me this 22d November, 1888.

K. LOEW,
U. S. Comm'r.

Judgment. Entered December 6th, 1888.

E. S. BARTON and WIFE
vs.
TUG CORSAIR. } 12567.

This cause came on to be heard upon the exception and was argued by the proctors.

And thereupon, upon consideration thereof, the court being of the opinion that the suit and the amended libel is an action under a special statute of the State of Louisiana subjecting the owners to liability, whereas the action under the original libel sprang from the general liability of ships viewed as offending things under the admiralty law; that the amendment introduced a new party, and since at the time of the amendment being made more than a year had elapsed, the exception is allowed and the suit dismissed.
25 It is therefore ordered, adjudged, and decreed that the exception be sustained and the libel dismissed at libellants' costs.

Judgment entered December 6, 1888.
Judgment signed December 11, 1888.

EDWARD C. BILLINGS, *Judge.*

Appeal. Granted December 11, 1888.

E. S. BARTON & *al.*
vs.
STEAM-TUG CORSAIR. } 12567.

On motion of R. DeGray and F. Zacharie, proctors for libellants, and on suggesting to the court that there is error to their prejudice in the judgment and decree rendered herein, rendered on the 14th day of May, 1888, and on the 5th day of December, 1888, and that they desire to appeal from the same—

It is ordered by the court that an appeal be allowed to libellants, returnable to circuit court of the United States for the eastern district of La. on the first Monday in Jan'y, 1889, upon giving bond in the sum of $50.00, conditioned according to law.

Appeal Bond. Filed 14 *December*, 1888.

Know all men by these presents that we, Elizabeth Barton,
26 as principal, and Frank A. Daniels, as surety, are held and firmly bound unto Samuel S. Brown and Harry Brown, claimants of tug Corsair, and also defendants, in the full and just sum of fifty dollars, to be paid to the said claimants and defendants, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of December, 1888.

Whereas the above-named Elizabeth Barton has appealed to the next term of the circuit court of the U. S. for the 5th circuit and eastern district of La. from final judgment of the dist. court of the U. S. for said district, rendered on 14th May, 1888, and 6th December, 1888, in the cause of E. S. Barton and wife *vs.* Tug Corsair, No. 12567 of the docket, said appeal returnable on 1st Monday of January, 1889:

Now, the condition of the above obligation is such that if the above-named appellant shall prosecute her appeal to effect and answer all damages and costs and satisfy all judgments that may be rendered against her, if she fails to make her appeal good, then the above obligation is to be void; else to remain in full force and virtue.

ELIZABETH BARTON.
FRANK A. DANIELS.

Sealed and delivered in the presence of—
K. LOEW, *D'y Clerk.*

Frank A. Daniels, surety on the within bond for an appeal,
27 being duly sworn, says: I reside in the city of New Orleans and am worth the amount of fifty dollars in real estate, situated in this city, over and above all my just debts and liabilities.

FRANK A. DANIELS.

Sworn to and subscribed before me this 14 day of December, 1888.

K. LOEW,
U. S. Com'r.

Bond approved December 17, 1888.
EDWARD C. BILLINGS, *Judge.*

Proceedings in U. S. Circuit Court.

Hearing and submission.

Extract from the Minute Book, November Term, 1888.

NEW ORLEANS, SATURDAY, *January 26th*, 1889.

Court met, pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

E. S. BARTON *et al.*
vs.
STEAM TUG CORSAIR. } No. 11762.

28 This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Louisiana, R. DeGray and F. C. Zacharie appearing for libellants, Hornor & Lee for defendants, and was argued by proctors and submitted, when the court took time to consider.

Decree. Entered and Filed Feb'y 4, 1889.

U. S. Circuit Court, Eastern District of Louisiana.

E. S. BARTON *et als.*
vs.
STEAM-TUG CORSAIR. } Admiralty Appeal. No. 11762.

This cause came on to be heard on the transcript, and was argued by Mr. R. DeGray, proctor for libelant, and Mr. J. P. Hornor, proctor for claimants.

Whereupon it is ordered, adjudged, and decreed that the libel herein be, and the same is hereby, dismissed with costs of both courts.

Judgment rendered 4th day of Feb'y, 1889.

(Signed) DON A. PARDEE,
Circuit Judge.

29 *Order Granting Appeal. Entered and Filed Feb'y* 15, 1889.

United States Circuit Court, Eastern District of Louisiana.

E. S. BARTON *et al.*
vs.
STEAM-TUG CORSAIR. } No. 11762.

On motion of Richard DeGray and F. C. Zacharie, proctors for Elizabeth Barton, libellant in the above cause, and on suggesting to the court that said E. S. Barton, the other libellant in said above cause, departed this life on the — day of ——, 1888, and since the decision herein in the district court of the United States for the eastern district of Louisiana, and on further suggesting to the court that there is error in the judgment of this hon. court dismissing the original and amended libel herein to her prejudice, and that she desires to appeal therefrom—

It is ordered that said Elizabeth Barton be allowed an appeal with a supersedeas from the judgment and decree herein rendered on the 4th day of February, 1889, and signed on the 11th day of February, 1889, to the Supreme Court of the United States on the second Monday of October, 1889, upon giving bond in the sum of one hundred dollars, conditioned according to law.

Feb'y 15th, 1889.

(Signed) DON A. PARDEE, *Judge.*

30 *Bond for Appeal. Filed Feb'y 27th,* 1889.

UNITED STATES OF AMERICA:

Know all men by these presents that we, Elizabeth Barton, of the city of New Orleans, State of Louisiana, and Patrick Ryan, also of said city and State, are held and firmly bound, jointly and severally, unto Samuel S. Brown and Harry Brown, of Pittsburgh, Pennsylvania, in the sum of one hundred dollars, lawful money of the United States of America, to be paid to the said Samuel S. Brown and Harry Brown, heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 27th day of February, in the year of our Lord eighteen hundred and eighty-nine.

Whereas the said Elizabeth Barton having heretofore, to wit, on the 15th day of February, 1889, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the fourth day of February, 1889, by the circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana, in the suit of E. S. Barton *et al. vs.* The Steam-Tug Corsair *et als.*, No. 11762 of the docket thereof:

Now, the condition of the above obligation is that if the above-

bounden Elizabeth Barton shall prosecute her said appeal to effect and shall answer all damages and costs if she shall fail
31 to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) ELIZABETH BARTON. [L. S.]
PATRICK RYAN. [L. S.]

Signed, sealed, and delivered in the presence of—

——— ———.

Bond accepted.

(Signed) DON A. PARDEE, *Judge.*

UNITED STATES OF AMERICA, } ss:
E. District of Louisiana, }

Personally appeared Patrick Ryan, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides 254 Dryades street, New Orleans, La., and is worth the full sum of one hundred dollars over and above all of his debts and liabilities and property exempt from execution.

PATRICK RYAN.

Subscribed and sworn before me this 27 day of February, 1889.

(Signed) E. R. HUNT,
Commissioner U. S. Circuit Court, Eastern District of Louisiana.

32 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit, and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 31 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of E. S. Barton *et al. vs.* Steam-Tug Corsair, No. 11762 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 20 day of March, A. D. 1889.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT, *Clerk.*

I, Don A. Pardee, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 20 day of March, A. D. 1889.

DON A PARDEE, *Judge.*

33 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Harry Brown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in the suit wherein Elizabeth Barton is libellant and appellant and Samuel S. Brown and Harry Brown are claimants and appellees, to show cause, if any there be, why the judgment rendered against the said Elizabeth Barton, as in said motion and order mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13 day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

DON A. PARDEE, *Judge.*

34 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11762. E. S. Barton & *al. vs.* S. S. Tug Corsair. Citation. No. —. U. S. circuit court, eastern district of Louisiana. Filed March 19, 1889. E. R. Hunt, clerk.

Marshal's Return.

Received Mar. 13, 188–, — the U. S. marshal, and on Thursday, March 14th, 1889, I served a true copy of the within citation of appeal on Harry Brown, claimant & appellee, by handing the same to Jos. P. Horner, proctor for claimant, in person, in the city of New Orleans, and leaving the same in his hands, the said Harry Brown, appellee, being beyond the limits of this district

GEO. MOORMAN, *U. S. M'l,*
By A. B. JOHNSTON, *Dep'ty M'l.*

A. B. Johnston, being duly sworn, deposes & says he is a duly qualified deputy U. S. marshal for the eastern dis'ct of Louisiana, & that the service above set forth is correctly stated, and that he served a true copy of the within citation of appeal on Harry Brown, defendant and claimant, by handing the same to Joseph P. Horner, his proctor, said Brown being absent from this district.

A. B. JOHNSTON.

Sworn to and subscribed before me this 15th day of March, 1889.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT, *Clerk.*

35 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Samuel Brown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, in the suit wherein Elizabeth Barton is libellant and appellant and Samuel S. Brown and Harry Brown are claimants and appellees, to show cause, if any there be, why the judgment rendered against the said Elizabeth Barton, as in said motion and order mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13 day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

DON A. PARDEE, *Judge.*

36 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11762. E. S. Barton *et al. vs.* S. S. Tug Corsair. Citation. No. —. U. S. circuit court, eastern district of Louisiana. Filed March 19, 1889. E. R. Hunt, clerk.

Marshal's Return.

Received Mar. 13, 188–, — the U. S. marshal, and on Thursday, March 14th, 1889, I served a true copy of the within citation of appeal on Samuel Brown, claimant & appellee, by handing the same to Jos. P. Horner, proctor for claimant, in person, in the city of New Orleans, and leaving the same in his hands, the said Samuel Brown, appellee, being beyond the limits of this district.

GEO. MOORMAN, *U. S. M'l,*
By A. B. JOHNSTON, *Dep'ty M'l.*

A. B. Johnston, being duly sworn, deposes & says he is a duly qualified deputy U. S. marshal for the eastern dis'ct of Louisiana, & that the service above set forth is correctly stated, and that he served a true copy of the within citation of appeal on Samuel Brown, defendant and claimant, by handing the same to Joseph P. Horner, his proctor, said Brown being absent from this district.

A. B. JOHNSTON.

Sworn to and subscribed before me this 15th day of March, 1889.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT, *Clerk.*

Endorsed on cover: Case No. 13,525. E. Louisiana C. C. U. S. No. 344. Elizabeth Barton, appellant, *vs.* Samuel S. Brown and Harry Brown, claimants of the steam-tug "Corsair." Filed March 30, 1889.

Supreme Court of the United States.

BARTON
vs.
BROWN. } No. 344.

It is admitted that E. S. Barton, one of the libellants in the above entitled and numbered cause, as the second husband of Elizabeth Barton, the other libelant, had no pecuniary interest in said cause, and his appearance therein was merely to assist his wife, under the code of Louisiana; that said E. S. Barton died after the decree in the district court and before the decree in the circuit court, and that after his death his heirs, under the laws of Louisiana, could have no interest therein, and that after his death the said Elizabeth Barton was the only party interested in said cause and entitled to an appeal.

New Orleans, December 23rd, 1891.

RICHARD DE GRAY,
Proctor for Libellant & Appellant.
JOSEPH P. HORNOR,
Of Counsel for Appellee.

[Endorsed:] 13525. 344. 13525. Supreme Court U. S., October term, 1891. No. 344. Elizabeth Barton *vs.* S. C. Brown & *al.* Stipulation & addition to record. Filed Dec. 21, 1891.

Office Supreme Court U.
FILED.
MAR 28 1892
JAMES H. McKENNEY,
C

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891. TERM NO. 344.

ELIZABETH BARTON, APPELLANT,

versus

SAMUEL S. BROWN AND HARRY BROWN, CLAIMANTS OF THE STEAM TUG CORSAIR, APPELLEES.

RICHARD DEGRAY,
Proctor for Libellant and Appellant.

L. GRAHAM & SON, 99, 101, 103 GRAVIER ST., N. O.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891. TERM NO. 344.

ELIZABETH BARTON, APPELLANT,

versus

SAMUEL S. BROWN AND HARRY BROWN, CLAIMANTS OF THE STEAM TUG CORSAIR, APPELLEES.

This suit was filed on the 5th day of April, 1888, by Elizabeth Barton, duly authorized and assisted by her husband Edward S. Barton, against the steam tug Corsair, on two distinct causes of action, viz.: One for damages for the pains and sufferings endured by Etta Barton, the daughter of the said Elizabeth Barton, in a collision caused by said tug Corsair (on which the said Etta Barton was at the time a passenger), running at full speed into the right bank of the Mississippi river, on the 14th of April, 1887, at a point about ten miles above Algiers (which is opposite the city of New Orleans), in consequence of which said tug filled with water and sank in about ten minutes thereafter; and all caused by the carelessness, negligence and want of skill and attention on the part of the officers and crew of said tug. The other cause of action is for the damages sustained by the said Elizabeth Barton, in the loss of the life of said Etta Barton.

Ten thousand dollars are claimed for the pains and sufferings endured by the said Etta Barton, between the time of said collision and the time of her death; and ten thousand dollars are claimed for the loss of the life of said Etta Barton. The

former is set out in *seventh* article of the libel, as follows: "That from the time said tug struck the bank of the river to "the time she sunk and the said Etta Barton was drowned, "she, said Etta Barton, suffered great mental and physical "pains and shock, and endured the tortures and agonies of "death, and the right of action for the recovery for said pains, "sufferings and shock survive in consequence of the death of "said Etta Barton, who died unmarried and without children, "to libellants, her father and mother, under article No. 2375 of "the Civil Code and the laws and jurisprudence of the State "of Louisiana; and they are entitled to damages therefor in "the full sum of $10,000."

The latter is set out in the *eighth* article of the libel as follows:

"That by the untimely and cruel death of their said daugh-"ter, through the carelessness, negligence, want of proper "skill of the officers and crew of said tug, as well as the want of "necessary and proper boats, life-preservers, and life-saving "apparatus, libellants, her surviving father and mother, have "been deprived of her society, companionship and support, and "been damaged thereby in the further sum of $10,000; and "the right to recover therefor is further given to libellants by "the aforesaid article of said Civil Code of Louisiana, as "amended by act of the Legislature of Louisiana, passed in "1884, as well as by the general admiralty law."

The want of attention, the negligence and carelessness of the officers and crew of said tug, and her unseaworthiness and want of equipments, whereby said collision was brought about, are further stated in the fifth and sixth articles of the libel.

Under the prayer of the libel, process was issued to the marshal, commanding him to seize the tug, and cite all parties pretending to have any interest therein to appear and show cause, on a day named, why said tug should not be sold.

On the same day (April 5, 1888), the claimants, Samuel S. Brown and Harry Brown, of Pittsburg, Pennsylvania, entered a full and unlimited appearance by filing a claim to the tug as owners thereof, and had her delivered to them on bond (p. 5).

On the 21st day of April, 1888, said Samuel S. Brown and

Harry Brown again appeared, and without reservation, and for exception to the libel, pleaded as follows:

1. That said libel sets forth no cause of action.

2. That under the allegations and averments of said libel, said libellants can not recover, for this, that their right of action for damages alleged to have been suffered in said libel perished with the person therein alleged to be deceased, and did not and does not survive under the law in favor of libellants, or either of them.

3. That if there is any cause of action presented by the libel in this case, it is not within the admiralty and maritime jurisdiction of this court.

4. That the court has no jurisdiction in the premises.

5. That if any cause of action is set forth in the libel, there is none presented justifying proceedings *in rem* under the admiralty and maritime jurisdiction of this court (p. 5).

On May 14, 1888, the court, *in part*, sustained this exception in the following language: * * "The court, considering that "no action *in rem* lies in this case, it is ordered that the ex- "ception be sustained to the extent of releasing the tug "Corsair from the seizure made under the admiralty warrant "issued in the cause, the court being of the opinion that the "statute of Louisiana creates no lien upon the vessel," and "that libellants be allowed to amend their pleadings and proceed "*in personam* against the owners of the vessel within ten days "if they see fit" (p. 6).

Thereafter, the case being still in the court and the libel not dismissed, the libellants, availing themselves of the right to amend, on the 15th day of May, 1888, filed an amended libel (using the form—except as to names—of the amendment allowed in the case of Blessing vs. Leathers, 105 U. S., p. 626, in the record of which case said amendment will appear, although no reference is made to it in the report of the court) making said Samuel S. Brown and Harry Brown defendants, and praying that they might be cited to answer, and that in case they could not be found, that then a writ of attachment issue; and this amendment was, on the same day, allowed, and the writ of attachment was ordered to issue (pp. 6 and 7).

On the same day citations were issued to said defendants and

an attempt was made to serve them with a copy of the libel, amended libel, and process *in personam*, but the marshal's return showed they resided permanently out of the jurisdiction of the court (pp. 10 and 11).

Thereupon, and on the same day a writ of attachment issued, wherein the marshal was commanded to arrest said defendants, and if they could not be found, that then the marshal attach their ships, goods and chattels, etc., to the amount of $20,000. The return to this writ shows the marshal, after diligent search and inquiry, was unable to find said defendants within his district, and that he was credibly informed they resided beyond the jurisdiction of the court, and thereupon he seized and took into his possession said tug Corsair under said writ, and thereupon she was again claimed in writing and without reservation by said defendants and delivered to them on bond (pp. 7, 8, 9 and 10).

Thereafter, on the 23d of May, 1888, said defendants, after their full and unlimited appearance, as above set forth, again appeared, and for the first time attempted to limit that appearance, by declaring they appeared "for the sole purpose of ex- "cepting to the manner in which they have been summoned to "be brought into court," and for exception to the libel and amended libel say:

1. That due and sufficient process has not been served on them to answer.

2. That if any legal warrant was issued, the same was done in violation of Rule 7 of the admiralty rules of the Supreme Court of the United States, being for more than $500, and without affidavit showing the propriety thereof.

3. That the proceeding *in rem and in personam* can not be joined in the same libel, and hence suit could not be changed from *in rem* to *in personam*.

4. That the cause of action set forth in the original and amended libel is perscribed by one year (p. 11).

The case was heard on these exceptions on the 16th Novem ber, 1888, and on the 6th of December, 1888, the following judgment was rendered.

* * "The court being of opinion that the suit and amended "libel is an action under a special statute of the State of Lou-

"isiana, subjecting the owners to liability, whereas, the action "under the original libel, sprang from the general liability "of ships viewed as offending things under the maritime law, "that the amendment introduced a new party, and since the "time of the amendment being made more than a year had "elapsed, the exception is allowed and the suit dismissed." (pp. 12 and 13).

Elizabeth Barton, (her husband E. S. Barton, having died, and his heirs having no interest in the case, see stipulation p. 20), then appealed to the Circuit Court, where the ruling of the District Court of May 14, 1888 (p. 6), dismissing the tug from seizure, and the ruling of December 6, 1888, dismissing the libel, were assigned as error.

The case was heard on appeal in the Circuit Court on February 4, 1889, and the libel was dismissed, with costs of both courts (p. 15).

ASSIGNMENT OF ERRORS.

The decree of the Circuit Court was erroneous in the following particulars:

1. In that, it did not maintain the seizure of the tug Corsair in the proceeding *in rem* for the sufferings, fright and shock endured by said Etta Barton during her lifetime while a passenger on board of said tug, and hold that the right of action *in rem* to recover therefor passed by *subrogation* under the Code of Louisiana to libellants.

2. In that, it did not hold that libellants were entitled to recover for the damages THEY had sustained by the death of Etta Barton, under the statutes of Louisiana.

3. In that, it did hold that the claims set up in the libel and amended libel were barred by prescription.

4. In that, it dismissed the libel and amended libel with costs and did not decree in favor of libellants for the amounts by them claimed against the tug Corsair, as in their original libel set forth, or against the owners of said tug as in their amended libel set forth, or decree in their favor for any sum whatever.

ARGUMENT.

The suit against the Harrisburg, reported in the 119 U. S. R., p 199, was a suit for damages for the DEATH of a human

being, which occurred in a collision, "about one hundred "yards from the Cross Rip lightship in a sound of the sea "embraced between the coast of Massachusetts and the islands "of Martha's Vineyard and Nantucket, parts of the State of Massachusetts," which was, in fact, a collision on the high seas.

The questions to be decided in that case were stated by the court as follows:

"FIRST—Can a suit in admiralty be maintained in the courts " of the United States to recover damages for the death of a " human being on the high seas, or waters navigable from the " sea, caused by negligence, in the absence of any act of Con- " gress or a statute of a State giving a right of action therefor?"

"SECOND—If not, can a suit *in rem* be maintained in ad- " miralty against an offending vessel for the recovery of such " damages when an action at law has been given therefor by " statute in the State where the wrong was done, and where " the vessel belonged?"

"THIRD—If it can, will the admiralty courts permit such a " recovery in a suit begun nearly five years after the death, " when the statute which gives the right of action provides that " the suit shall be brought within one year?"

The court answered the first question in the negative. The other questions it did not answer, as it was "entirely satisfied " the suit was begun too late;" that "the statute created a " new legal liability, with a right to a suit for its enforcement, " provided the suit was brought within twelve months, and not " otherwise."

The suit against the Alaska, 130 U. S., p. 209, was also one "to recover damages for the death of a human being on the " high seas," and, as appears by the opinion of the court, it " was admitted that the statute of New York on the subject of " actions for DEATH by negligence did not apply, because the " death did not occur within the State of New York or in " waters subject to its jurisdiction."

As we have seen, two separate and distinct causes of action are set out in the libel: one for the pains and sufferings endured by Etta Barton *during her lifetime* between the time of the collision and her death; the other for the damages sustained by the libellants directly by the death of Etta Barton.

The present case, as to either cause of action, is not a suit for damages for a death caused by negligence on the high seas, but a suit for damages caused by negligence on the Mississippi river, about one hundred miles above its mouth, and, therefore, under the jurisdiction of the State of Louisiana.

The second cause of action, although occurring in the State of Louisiana, being for the recovery for damages for the DEATH of a human being, may, if the Louisiana statutes did not apply, be governed by the Harrisburg and Alaska cases; but the first cause of action, wherein damages are claimed, for the pains and sufferings Etta Barton sustained, cannot be governed by those cases, for it is in no sense a suit to recover damages for the DEATH of Etta Barton, but is a suit to recover damages which a passenger, during her lifetime, sustained, through the negligence of the officers and crew of the steam tug Corsair.

This brings us to the inquiry as to what is the right of action and the remedy in admiralty of a passenger for damages sustained on a vessel on which such passenger is being carried.

In the case of the Moses Taylor, 4 Wall., p. 427, this court said:

"There is no distinction in principle between a contract of "this character and a contract for the transportation of mer- "chandise. The same liability attaches upon their execution, "both to the owner and the ship. The passage money in one "case is equivalent to the freight money in the other; the "breach of either contract is the appropriate subject of ad- "miralty jurisdiction."

And it makes no difference whether the transportation of the passenger or the freight be wholly within the State or not.

In Insurance Co. vs. Dunham, 11 Wall., p. 28, the court said:

"In the case of the Moses Taylor it was decided, that a con- "tract to carry passengers by sea as well as a contract to carry "goods was a maritime contract and cognizable in admiralty, "although a small part of the transportation was by land, "the principal part of the transportation being by water. In "a late case of affreightment, that of the Belfast, it was con- "tended that admiralty jurisdiction did not attach because the "goods were to be transported only from one point in the State

" to another in the same State, and were not subject to inter-
" state commerce. But, as the transportation was on a navi-
" gable river the court decided in favor of the jurisdiction be-
" cause it was a maritime contract."

Numerous decisions have been rendered by this court in proceedings *in rem* giving passengers damages for injuries sustained on vessels, through the fault of its officers. The City of Panama was a suit in admiralty by proceedings *in rem* by a passenger for injuries sustained on that boat, and at page 462 this court said:

" Injuries of the kind alleged give the party a claim for com-
" pensation, and the cause of action may be prosecuted by a
" libel *in rem* against the ship, and the rule is universal that
" if the libel is sustained the decree may be enforced *in rem*,
" as in other cases where the maritime lien exists."

In the case of the steamboat New World, 16 How. 469, there was a gratuitous carriage of a passenger, and the court, in a proceeding IN REM, awarded damages.

Now, suppose Etta Barton had survived her injuries and brought her suit in admiralty *in rem* for the pains, injuries and shock which she sustained in this collision, and thereafter died, would that suit have died with her? It certainly would not, because it would pass (if in no other way) by subrogation, under the first part of Art. No. 2375 of the Civil Code of Louisiana, to the parties therein named. In fact, prior to the amendment to the Code in 1884, it was only for the recovery of such damages as she sustained as did pass to the parties named.

In Thos. J. Erhart vs. New Orleans & Carrollton Railroad, 17 La. An., p. 243 (which was a suit by the father and mother), the law of Louisiana on this subject, under the above article of the Code, was stated as follows:

" In the words of the statute, it is a legal subrogation in favor
" of the persons designated, to the right of action, of the de-
" ceased sufferer, and in case of suit under that subrogation,
" the plaintiff should allege his cause of action as derived from
" the deceased under the statute."

Therefore, we say the right of action *in rem*, which existed in favor of Etta Barton for the injuries and pains she suffered during her lifetime, by reason of the negligence of the officers

and crew of the tug on which she was a passenger, certainly passed, under the Code, to her father and mother, and that the suit by them should have been sustained.

But suppose we are wrong in this matter, and that the right to proceed *in rem* did not pass to the libellant, surely, there can be no doubt but that the right to proceed *in personam* against the owners of the tug did pass, under the Code, to the libellants.

And here we are met with the proposition as to whether a proceeding *in rem* can be amended into a proceeding *in personam*, and if it can, whether a party, having availed himself of the right given him to amend, can thereafter complain of the judgment dismissing the seizure in proceeding *in rem*.

As we have already stated, the amendment in the case, from a proceeding IN REM to a proceeding *in personam*, was such an amendment as was allowed and made in Blessing vs. Leathers, 105 U S. R. (which will appear in the record of the case, although it does not appear in the Report).

In the case of Chamberlain vs. Ward, 21 How., a like amendment was made. The court, at page 554, said: "Ac- " cording to the libel, the original libel was filed in the clerk's " office in the District Court on the 27th day of October, 1852, " and on the same day a process of attachment against the " propeller and monition to her owners was taken out and sub- " sequently served, pursuant to its mandate, by attaching the " vessel, publishing notice to those interested and summoning " respondents. On the 17th day of November following an " amended libel was filed in court, setting forth more in detail " the circumstances of the collision and the grounds of the " claim as made by the libellants. As amended, however, the " libel still retained in some of its aspects the form of a pro- " ceeding *in rem* against the vessel, and a suit *in personam* " against her owners.

" In the answer, which was not filed until after the process " was served, the appellants as claimants of the propeller and " respondents in this suit, excepted to the form of libel, alleg- " ing that the two modes of proceeding were improperly " joined, and prayed that the libel should be dismissed on that " account. At the hearing in the District Court the exception

" of the respondents for a misjoinder was sustained, and there-
" upon the libellants, on motion for leave, were permitted to
" amend and change the proceeding to the form of a suit *in*
" *personam* against the appellants as owners of the propeller,
" and the cause was allowed to progress, and in that form of
" proceeding the parties were ultimately heard upon the merits
" of the controversy." The case, as thus amended, was disposed in the Supreme Court.

In Bett's Admiralty Practice, the right to amend in this particular is thus stated at page 99:

" The practice of this court is not to render a decree *in per-*
" *sonam* on a libel *in rem*, but if the case proved shows a
" clear right of recovery against the person (whether the ac-
" tion *in rem* is sustainable or not), the libellant will be per-
" mitted, after decree, to introduce the proper allegations *in*
" *personam*, and proceed therein; care, however, will be taken
" that no surprise or advantage is allowed against the defendant
" by means of such change of direction of the action.

" Full notice must be given him of the change of proceed-
" ings, and although his appearance in the action *in rem* places
" him so within the jurisdiction of the court as to authorize it
" to mold the action conformably to the justice of the case, his
" stipulators will not be bound for any act or proceedings out
" of the suit *in rem*."

Under the 24th Admiralty Rule and The Chas. Morgan, 115 U. S., p. —, it would seem as if almost any kind of an amendment could be allowed in admiralty which did not entirely change the cause of action.

Can the libellants, having availed themselves of the right given them to amend their proceedings and proceed *in personam*, complain of the judgment dismissing their seizure *in rem*?

It will be perceived the original libel was not dismissed under the exception, but remained in court, with leave to amend, or, in other words, the seizure was dismissed, but the suit was retained. The case in this respect is equivalent to that where a demurrer is overruled and then an answer filed, and in such a case this court, in Teal vs. Walker, 111 U. S., p. 242, held the defendant by answering did not lose his right to have the judg-

ment rendered on a verdict of a jury reviewed for error in overruling the demurrer.

We come now to a discussion of the questions raised by the exceptions filed on May 23, 1888, p. 11.

1. In response to the first exception, wherein it is contended sufficient process has not been served on defendants to oblige them to appear and answer, we say the property of the defendants was seized (attached), and they appeared in court and claimed the same (pp. 8 and 9), and it was delivered to them on the same condition stated in their bond (wherein due appearance is acknowledged) as follows: "That the said "owners of the tug Corsair, Wm. H. Brown & Sons, Samuel "Brown and Harry Brown, shall abide by all orders inter- "locutory or final, and pay the amount awarded by the final "decree and judgment as may be rendered in the libel "pending in the United States District Court aforesaid, or "any appellate court; then this obligation to be void, else to "remain in full force."

The defendants were, therefore, brought into court under the attachment issued under their amended libel, and by their appearance duly recited in their bond, and bonding their property thereunder, and they remained in court until the final decree, when the court dismissed the case under the plea of prescription, which will be noted hereafter.

2. In response to the second exception, that there was no legal warrant of attachment issued, because the case being for a sum exceeding $500, the same could not legally issue under Rule 7 of the Admiralty rules without an affidavit or other proof showing the propriety thereof, we say: the original libel was sworn to, the claim filed by the claimants on the 5th day of April, 1888, and sworn to by their duly authorized agent, showed they lived beyond the jurisdiction of the court, and in Pittsburg, Pa.; the exceptions to the original libel filed April 21, 1888, show the defendants to be of Pittsburg, Pa., while the amended libel but showed what had been thus sworn to by the defendants' agent, and admitted by them to be their residence. Surely if the original libel sworn to by the libellants, coupled with the sworn statements of the duly authorized agent of the defendants, if not such an affidavit as is required by the rule in question, it

certainly is the "other proper proof" required by the rule. All of this was before the court before it signed the order for attachment under the amended libel.

Farther than this, the affidavit of Elizabeth Barton, the libellant, showing the propriety of the issuance of the writ, was filed with the leave of the court before the final decree was rendered in the District Court (p. 13).

3. In response to the third exception, that proceedings *in rem* and *in personam* can not be joined in the same action, we say there is nothing in the Admiralty Rules of the United States Supreme Court or those of the District Court of Louisiana prohibiting such a joinder, and the amendment from a proceeding *in rem* to one *in personam*, as we have already shown, is abundantly supported, and by the best of authority.

4. This exception is the one on which the court dismissed the suit, because, as it said, said suit was prescribed, under the State law, by the lapse of one year from the time the disaster occurred, on the 14th of April, 1887.

The suit was filed on April 5, 1888, and seizure was made and appearance was entered on that day by the defendants filing their claim, and on the same day giving their bond for the release of the property.

The suit, therefore, which began *in rem*, became by the appearance of the defendants, to all intents and purposes, a suit *in personam* on the day the bond was filed, for thereafter no judgment could be rendered against the vessel (which was discharged from all lien), but only *in personam* against claimants and sureties.

The effect of such an appearance and giving bond was decided in the Fifth Circuit in Roberts vs. The Huntsville, 3 Wood, p. 386. There a ship was libeled for salvage, and a decree for salvage was rendered. The sureties for the claimants—the owners—were compelled to pay the salvage decree, and it was held that the sureties, although subrogated to the rights of the libellants, could not seize the vessel as against valid mortgagees. Judge Bradley said: "The salvors themselves ceased to have any lien on the ship after she was "claimed and released from their seizure on the stipulation. "*Their claim then became a personal one against the owners*

" *and stipulators*. It has been repeatedly held, that except " where fraud has been practiced in procuring the vessel's " release, the libellants can not re-seize her. By their discharge " she becomes free, and all anterior liens stand good against " her as before the seizure; so that if the present libellants " were invested with every right of the salvors, they could not " have recourse to the ship again for the cause of salvage, " except as they would have recourse against any other prop- " erty of the owner. The Union, 4 Blatch. 90; The White " Squall, 4 Blatch. 103, and cases there cited by Justice Nelson, " and cases referred to by Judge McCaleb in Carroll vs Leath- " ers, Newberry, R., 432.

To the same effect is the decision in the case of the Zenobea (1 Ab. Admiralty, p. 55), where Judge Betts, speaking of the right of amendment from *in rem* to *in personam*, said:

" It seems to me, also, that this is the spirit of the En- " glish practice, both early and modern, although under that " system a somewhat circuitous method was originally em- " ployed in effecting the object, instead of directly arresting " the party sought to be made personally responsible. It " seems in actions lying purely *in rem* against vessels, that " when an owner enters an appearance, the court thereupon " takes jurisdiction over him individually, because appearance " in the high admiralty being by stipulation, the court thus ac- " quires the power to act against him *in personam* (2 Browne's " Civ. and Adm. L. 398, Ib. 407-409). And his *fide jusoris* are " compelled to satisfy the condemnation and costs. (Clarke's " Praxis, tit. 4, 5. 12.)

" The practice continues substantially the same in the En- " glish admiralty to this day. The St. Johan, 1 Hag. Ad. R. " 334; The Tribune, 3 Ib. 114. The case of the St. Johan " also shows that where the remedy is *doubtful* against " the vessel, but is *legal and equitable* against the owner, " the court will avail themselves of his appearance to de- " cree the debt and costs against him personally. This per- " sonal appearance is also constrained by the course of the court, " for in suits *in rem*, on his failure to intervene, the property is " absolutely condemned to the libellant (2 Browne's Civ. and " Adm. L. 400).

Surely, there can be no doubt of the appearance of Samuel S. Brown and Harry Brown, by their exceptions, filed April 21, 1888, p. 5.

The property had been released on stipulation for sixteen days. Their proceedings were not solely to contest the validity of the seizure or the jurisdiction of the court, but was general and for numerous causes:

1. No cause of action stated, which involved the merits.
2. The right of action alleged perished with the death of the passenger.
3. The cause of action not within the admiralty.
4. The court without jurisdiction.
5. Not entitled to proceedings *in rem*.

Each and all of these matters (except perhaps the 4th) were a general appearance.

They certainly do more here to get into court than the defendant did in Jones vs. Andrews, 10 Wall., p. 327. The court, at page 332, said: "In this case Andrews (the defendant) was a necessary party, and he was not a resident of the district and was not served with process, but voluntarily appeared. It is true that as soon as he appeared he moved a dismissal of the bill on two grounds: (1) That it did not show such facts in regard to the citizenship or residence of the defendants as to give the court jurisdiction. (2) That it contained no equity. Whether if he had made the motion on the first ground alone he would have waived his personal exemption, it is not necessary to decide. His moving to dismiss for want of equity was clearly a waiver; and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the court dismissing the bill for want of jurisdiction must be reversed.

Surely, it can not be that after a man's property is attached, and he has appeared and bonded that property and pleaded to the merits, that he must be personally served with process to bring him into court so as to interrupt prescription.

We emphasize "pleaded to the merits," because the exception of no cause of action is a *plea to the merits*, and is in fact an *answer*.

In Lee vs. Terry, 20 An., p. 429, the court said:

"The important question presented in different forms during "the progress of the suit, was whether the paper styled a per- "emptory exception 'that the petition exhibited no cause of "action' was an anwer to the merits, as it was deemed to be by "the court on the first trial. The opinion of the court that it "was an answer rested on the decision of the case ot the Cit- "izens Bank vs. Beard, 5 An. 41, analagous to this one. The "ruling of the court in both, the one in 5 An. 41, and 15 An. "160, is apparently in conflict with two later cases (the only "two out of many decisions to which our attention is called), "which involve precisely the same question, viz.: that of Loving "vs. Kimball, 15 La. 200; Legune vs. Herbert, 6 Rob. 421. "After an examination of the question, which we have duly "considered, we have come to the conclusion that the rule of "practice, as enumerated in the latter cases, is, under our sys- "tem of pleading, the correct one. Articles 314-327, Code of "Practice, Vavassion vs. Bayou, 11 Martin, O. S., 640."

"The exception is therefore considered by us, as it was by "our predecessors, an *answer* to the plaintiff's petition."

Under the Louisiana statutes and decisions, it is clear that the suit was brought before the prescription of one year attached, and that the seizure of the tug and the appearance and bonding of the same were an interruption of that prescription as long as the suit was pending.

Article 3518 of the Civil Code provides: "A legal inter- "ruption takes place where the possessor has been cited to ap- "pear before a court of justice, on account either of the "ownership or the possession; and the prescription is inter- "rupted by such a demand, whether the suit has been brought "before a court of *competent jurisdiction or not.*"

And Article 3551 provides: "The prescription releasing "debts is interrupted by all such causes as interrupt the pre- "scription by which property is acquired, and which has been "explained in the first section of this chapter."

The want of citation is waived by the defendant, who appears for any other purpose than to plead the want thereof. City of New Orleans vs. E. O. Hall, 21 An. 438; City of New Orleans vs. Walker, 23 An. 803; Nicholson vs. Jennings, 27

An. 432; Heard vs. Patton, 27 An. 542; Tutorship of minor heirs of Byland, 38 An. 756.

In Shields vs. Barrow, 13 An., p. 57, the defendants in a chancery suit were ordered, under a penalty, to file a cross bill and bring in other parties, against whom complainants had demands, but whom he could not call before the court, as they were citizens of the same State as complainant, who *appeared* and *answered* by denying the jurisdiction of the court, and in case their plea was overruled, then set up matters of defense to the complainants' demands, and the United States Supreme Court held (171 and 130) that the Circuit Court did not acquire jurisdiction over such parties, and dismissed the suit against them. It was held that the proceeding in the United States Circuit Court had the effect of interrupting the prescription of all the parties who answered within the period of prescription.

The Chief Justice, although dissenting from the conclusion arrived at by the majority of the court in that case, in discussing the plea of prescription said: "Neither is a *citation eo nomine* "essential to interrupt prescription. The Federal Court, exer- "cising chancery jurisdiction, commences its proceeding by a "subpœna. We must, where it has concurrent jurisdiction "with our courts at least, consider the subpœna equivalent to "a citation. Jackson vs. Trevnar, 15 La., Rob. 485. So also "where a citation is waived and the party voluntarily appears, "the same effect must be given to the proceeding as would be "given had the answer or *plea* been preceded by a citation. "C. P. 177. A reconventional demand has the like effect, be- "cause no citation is required, the party being already in court. "Peggs vs. Morgan, 10 La. 119. Under the Roman law it "was the *contestatio litis* which interrupted the prescription. "The joining of issue cannot have a less effect with us, for it "either supposes a citation or a waiver of citation."

In Elmore vs. Ventress, 24 An., p. 383, the court said:

"The citation to the estate of John M. Brown was informal, "being addressed to Florence A. Ventress, instead of Florence "A. Ventress, administratrix; but without excepting she after- "ward appeared as administratrix and answered to the merits. "The curative power of this answer, we think, *related back* to "the time when she was personally served with the petition con-

" taining a demand on the estate, and with a citation which, " though informal, required that plaintiff's demand should be " answered by such estate."

In Satterly vs. Morgan, 33 An., pp. 848 and 849, the court said:

" Citation *eo nomine* has not been insisted on, nor citation " before a court of competent jurisdiction, nor citation techni- " cally perfect in form and service. The broad doctrine was " laid down by the court in Flower vs. O'Connor, 17 La. 219, " that in order to determine the effect and extent of a legal in- " terruption, we must inquire more particularly into the object " and cause of action than into the right of the plaintiff, the " manner in which it is prosecuted, and the competency " of the court in which it is instituted, and endeavor " to ascertain how far the knowledge of the titles on which the " action is founded has been brought home to the defendant by " the judicial demand, and we do not hesitate to conclude that " if it be *established* that the defendant has been judicially " notified of the titles which are the foundation of the demand, " so as to acquire *sufficient knowledge of the rights which are* " *sought to be enforced against him by suit, there results from* " *said suit a legal interruption in favor of those to whom such* " *rights may belong.*"

There are proceedings *in rem* in Louisiana, and an appearance in a proceeding strictly *in rem* under its Code of Practice is such an appearance as to justify a judgment *in personam* as well as *in rem*, and is, therefore, an interruption of prescription in either.

In Holmes vs. Steamer Chieftain and Owners, 1 An., p. 136, the court said: " The plaintiff appears to have founded his " action upon the statute of 1840, which grants to owners a " privilege upon the vessel on which slaves are found, in viola- " tion of its provisions, for both the damages and the fine, and " he commenced his proceedings by a provisional seizure, " alleging, in his petition, that the owners of the boat were " unknown to him. The proceedings being *in rem*, it was not " necessary that the names of the defendants should have been " ascertained before commencing suit. This presented no " impediment to his proceeding to final judgment and " execution.

"Code of Practice, Arts. 290 and 291.

"Beel & Curry's Dig., p. 847.

"The defendants, however, choose to appeal, and in their "exception to the petition for its alleged defect, disclose their "names, of which the plaintiff availed himself to *amend* his "pleadings, which the judge did not err in permitting to be "done. The nature of the action was not changed; the "exception taken did not tend to the dismissal of the suit, and "the plaintiff had a right to a judgment *in personam* as well "as *in rem*."

Proceedings by attachment under the Code of Practice of Louisiana are quite analogous to proceedings *in rem* in admiralty. In both, suit is begun and jurisdiction is acquired by the seizure of the property, and the effect of the appearance and bonding under the Code and Section 941 of the Revised Statutes of the United States is also quite analagous.

In J. B. Rathborne vs. Ship London. 6 An., p. 439, the head-note, which fully states the case, is as follows:

"Where the property of an absent defendant has been at- "tached, and the defendant appears and bonds the property, "giving security for paying whatever judgment may be "rendered against him, the defendant thereby becomes liable "to a personal judgment rendered against him, although he "may never have been cited."

This was the attachment of a vessel belonging (as did the Corsair) to absent owner, who (as in this case) appeared and bonded the vessel through his agent, and judgment was rendered without citation. That judgment was attacked on the ground that there had been no citation; but the court held that the appearance of the defendant and the bonding of the property was a waiver of citation. The court said: "It was held by the "District Judge that the judgment was personal against all the "defendants *in solido* and not *in rem* exclusively, or limited to "the object attached. The antagonistic proposition of the "counsel of the appellees is, that his clients were only in court "by the attachment of the London,no citation having been "served on them, and they being absentees and not within "the jurisdiction of the court. * * * * The defendants "bonded the ship and released her from the attachment under

" the 259th Article of the Code of Practice, which provides " that the defendant, if he appear, either in person or by his " attorney, may, moreover, in any stage of the suit, have the " attachment set aside by delivering to the sheriff his obligation " for the same, exceeding by one-half that which is demanded, " with the surety of a good and solvent person that he will " satisfy such judgment as may be rendered against him in the " suit pending.

"The condition on which the property attached, is delivered " to the defendant is, that he should appear by person or " attorney, thus rendering himself liable to judgment on his " default to answer, and that he should give security *judicatum* " *solvi.* * * * It seems to us beyond all question that the " purpose of the law was to give in the case provided to the " creditor a personal judgment against the debtor, which he " was required to give security to abide and perform. The " words in the article are free from any qualification or am- " biguity, and leaves no other interpretation. The defendants " in the present case fulfilled the conditions on which their " property was released from attachment; they appeared by " their attorney and pleaded to the merits of plaintiff's action " *without any exception or reservation.* * * *

"If the party defendant elects to appear and give his bond " *judicatum solvi*, and defends the action *without reservation*, " we think he becomes bound by a judgment rendered against " him *in personam.*"

So in Kendall vs. Brown, 7 An., p. 668, it was held: "When " a defendant in attachment appears by an agent (as here) and " bonds the property attached, the agent will be considered as " representing the principal, so as to bind him to comply with " the conditions of the bond, the essential condition of which " was to defend the suit or abide by the judgment that may be " rendered; and it is not necessary in such cases to appoint an " attorney to represent the absent defendant." Or, in other words, the bonding is a personal appearance, which authorizes on proper proof of merits a personal judgment against the defendant—just as if suit had been begun by personal service of citation.

In McRea, Coffman & Co. vs. N. Austin, 9 An., p. 361, it

was held that where an attachment is dissolved by bond substituted for the property attached, neither the defendant nor his sureties can afterwards object to the proceedings as irregular, under article 257 of the Code of Practice. The informality was waived by the appearance and bonding.

In Savage vs. Voorhees, 13 An., p. 550, the court said: "When a party defendant in an attachment gives his bond, "although he thereby releases the property attached, he yet "brings himself within reach of a personal judgment, because "he appears and undertakes to defend the suit, which otherwise might have been *in rem* only."

In Scott vs. His Creditors, 3 An., p. 40, it was held "a "provisional seizure of a steamer by a privileged creditor will "suspend the prescription running against his claim."

The application and force of the above decisions will more clearly appear when we refer to the law under which the Browns bonded the tug from the seizure in the proceedings *in rem*.

Section No. 941 of the U. S. Revised Statutes provides, when a warrant of arrest or other process *in rem* is issued in any cause of admiralty and maritime jurisdiction, * * * the marshal shall stay the execution of such process, or discharge the property arrested, if the process has been levied on receiving from the claimant of the property a bond and stipulation in double the amount claimed by the libellant, with sufficient surety, * * * *conditioned to answer the decree* of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon against both the principal and sureties may be recovered at the same time of rendering the decree in the original suit.

And in proceedings by Executory Process, under Art. 732, which the Code of Practice says resembles the proceedings *in rem*, the court, in Stansborough vs. McCall, 4 An., p. 324, held: "Where a creditor whose claim is secured by a mort-"gage may proceed against the same person by a personal ac-"tion, or by executory proceedings, the institution of proceed-"ings *via executiva* will interrupt the prescription running "against the personal action; and this interruption is continu-"ous, preserving the personal action while the executory pro-"ceedings are being prosecuted, and *vice versa*."

In Rhea vs. Taylor, 8 An., p. 23, the court, at page 24, said: "The third and last ground of defense is that the proceedings "by the *via executiva* did not interrupt prescription. This ques- "tion received from us an elaborate examination in the case "of Stansborough vs. McCall, 4 An. 322, and has been sub- "sequently affirmed in Tortieu vs. Zemple, 6 An. 54. Service "was made on Taylor of the notice of seizure on the 14th of "December, 1844, seventeen days before the prescription had "accrued on the first note of the series. The executory pro- "ceedings terminated on the 1st of March, 1845, and on the "1st of July, 1847, and the defendant had notice of the present "action; prescription had not, therefore, been acquired."

In Herbert vs. Chastant, 22 An. 153, the court said: "If "prescription has not been arrested by some act of the de- "fendant, *or some process of court*, within a limited time. "the law presumes the debt has been paid. It is a statute of "repose based upon the presumption of payment, where the "creditor has failed to assert his rights in the time limited for "him to do so. When the service of the *executory process* was "made on the defendant on the 13th of May, 1867, he became "a party to a judicial proceeding against him, for the recovery "of the debt, whether he saw fit to litigate it or not. The law "would hardly presume a creditor paid who made his debtor "a party to a judicial proceeding, and actually had his prop- "erty under seizure and advertised for sale, within the period "limited for prescription to accrue." (See also Tertru vs. Durand, 30 An., p. 1108.)

Under the Code of Practice of Louisiana, judgments may be annulled for various causes. Article 606 says: "The vices of "form for which a judgment can be annulled are the follow- "ing: * * *

"4. If the defendant has not been duly cited, and has not "*entered appearance, joined issue*, and had not a regular "judgment by default entered against him."

In Walworth vs. Stevenson, 24 An., p. 252, the court said: "The error he commits is in supposing there can be a judg- "ment when the defendant has neither been cited nor appeared "to defend the suit." In Bernard vs. Vignaud, Judge Porter said: "In every judgment the agency of three parties are re-

" quired; *judex actor et reus.* To condemn without first hear-
" ing a defendant, or giving him an opportunity to be heard, is
" contrary to all principles of equity and law. Therefore, a
" judgment rendered against a person without citing him in the
" ordinary manner, *without his appearing or any thing*
" deemed in law equivalent to a citation, or an appearance, is
" utterly void and imports such absolute nullity that any one
" the least interested in opposing its effects may have such nul-
" lity pronounced." 1 N. S. R. 9.

The appearance of the defendants on the 5th of April, 1888, and their further appearance on the 21st of April, 1888, and their pleadings and exceptions on that day filed, and without reservation, was such an appearance as under the State law would have justified a personal judgment against them in the absence of any citation. Surely, it such appearances were sufficient to justify a personal judgment, they certainly were sufficient to interrupt prescription.

In every case where the court has held citation was necessary, it will be found there never was any appearance.

In Bertrand vs. Knox, 39 An., p. 431, where it was decided a citation served on a married woman, under a petition in which she was sued as a single woman, was not good, and would not interrupt prescription, there was no appearance, for the court took particular pains to remark (p. 433): " We note here, that Mrs. Bory has never made any defence or *appearance* whatever during the whole contest." The remark of the court is pregnant with the affirmation that had Madam Bory appeared the prescription would have been interrupted.

In Hill vs. Barlow, 6 Rob. 142, where the court said, " It is
" therefore necessary that the party should be cited, and it can
" not be controverted that any other means of knowledge of
" the proceedings instituted against him, brought home to the
" party against whom the prescription is sought to be legally
" interrupted, would not be sufficient to operate as a legal in-
" terruption in the true sense of the law," the court, on page 148, showed there had been nothing amounting to an appearance by the defendant.

In Wall vs. Wilson, 2 La., p. 169, there was no appearance by the defendant, and the court said: "Although a party

" be arrested and held to bail, service of the petition and cita-
" tion can not be dispensed with, and knowledge of the suit on
" the part of the defendant, no matter how clearly it might be
" brought home to him, will not suffice, if this formality has
" not been pursued."

The court, at page 172, further said: "Nothing will cure the
" defect *but appearance* and pleading to matters other than
" defect of the citation."

In Slocumb vs. Brown, 13 La. 10, where the court held "that
" where a non-resident is held to bail, but leaves the court be-
" fore service of the petition is made on him, the suit will be
" dismissed; service of both citation and petition is necessary
" to bring a party into court to answer," the court showed there had been no appearance by the defendant.

In Jacobs vs. Sartorious, 3 An. 9, where the court held that an omission to serve the petition and citation on the defendant was not cured by the service of a writ of arrest, nor could the appearance of counsel for the defendant, on motion to set aside the arrest, be considered a waiver of service of citation and petition, nor authorizing the presumption of an acknowledgment of service, there was no appearance and plea to the merits (no cause of action), as there is in the case at bar.

In Dwight vs. Brasher, 5 An. 550, the whole question was whether a judgment, which had been declared null for the sole want of citation, interrupted prescription, and the court held it did not. But under the authorities already cited, it is clear if there had been an appearance, even though no citation had been served, the judgment never could have been annulled, and the prescription would have been held interrupted.

So in Tanner vs. King, 10 An. 485, where the court said there must be citation to interrupt prescription, the question was solely whether or not a judgment based on a citation served on an overseer of the defendant, who was beyond the jurisdiction of the court, was a valid judgment and interrupted prescription. The question of appearance or no appearance never entered in the case at all.

And where it has been held that the pendency of a suit based on the service of process or the appearance of the defendant between the same parties, did not interrupt prescription on the

same demand in a subsequent suit, it was because of some statute to the contrary.

The case of McCan, Assignee, vs. E. Conery & Son, 12 Fed. R., p. 315, was one arising under the late bankrupt law, and was one where a suit had been wrongfully brought on the equity side of the court, and had been dismissed on that account. A subsequent suit was then brought by the same party on the law side of the court; but before the second suit was instituted the prescription of two years had acquired under the act of Congress.

The court here decided, that the suit on the equity side of the court did not interrupt the prescription in the suit at law, but this decision was based *solely* on the prescription provided for in the bankrupt act, and this fact the court stated as follows:

"Of course, the legislation of the various States in regard "to the interruption or suspension can not apply, the whole "matter being within the control of Congress."

The error that was committed in the lower court was in applying the doctrine in Miller vs. McIntyre (6 P., p. 61).

The facts in the two cases are entirely different.

In the present case the parties against whom the proceedings *in rem* were charged to those *in personam* by the amended libel were in court when they filed their claim to tug, and were thus notified of the suit on the 5th of April, 1888, and if not then they were certainly in court and were notified of the claim and suit when on the same day they gave their bond conditioned to pay libellant's claim. This was all nine days before the year had elapsed.

And if the defendants were not in the court at the times and by the means above stated, they certainly were in court when they pleaded to the merits of the libel, without reservation, on the 21st of April, 1888, which was a waiver of all prescription (if any had acquired), because none was claimed.

Now, in the case of Miller vs. McIntyre, the new parties brought in by the amended bill had never been in court until that amended bill was filed, and, of course, there could be no interruption of the limitation, because there was neither suit, against them, or service on them, until after the limitation had

accrued. In other words, they stood precisely as parties entirely out of court, and against whom no demand is made.

Surely, the decree of the lower court should be reversed, and the matters complained of in the seventh article of the libel should be inquired into in the proceedings *in rem;* but if we are wrong in this particular, the entire matters complained of should be heard, in the proceedings as amended, *in personam*, because the action was not prescribed under the State law, when the amendment was made, as the defendants were in court anterior to any prescription attaching.

A recovery was had in Admiralty in case of death in proceedings *in personam* in the following cases: The Cephalonia, 29 Fed. R., page 332; affirmed on appeal in the 32d. Fed. R., page 112; and in Hrebrik vs. Carr, 29 Fed. R. 289.

All of which is respectfully submitted.

RICHARD DEGRAY,
Proctor for Libellant and Appellant.

Office Supreme Court U. S.
FILED.
APR 11 1892
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 344.

ELIZABETH BARLOW,

APPELLANT,

VERSUS

S. S. BROWN AND H. BROWN,

APPELLEES.

Article No. 2315 (which on page 8 of libellant's brief is referred to, by mistake, as Article No. 2375), as amended and in force, at the time of the cause of action accrued, is as follows:

ACT NO. 71, OF THE YEAR 1884.

An Act

To amend and re-enact Article 2315 of the Civil Code.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana:* That Article two thousand three hundred and fifteen (2315) of the Civil Code be amended and re-enacted, so as to read as follows: Article 2315. "Every act, whatever, of man, that causes damage to another, obliges him by whose fault it happened, to repair it; the right of this action shall survive, in case of death, in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife, as the case may be."

APR 25 1892
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 344.

ELIZABETH BARTON, APPELLANT,

versus

SAMUEL S. BROWN AND HARRY BROWN,
CLAIMANTS OF THE STEAMTUG CORSAIR.

Appeal from the United States Circuit Court for the Eastern District of Louisiana.

BRIEF FOR CLAIMANTS.

JOSEPH P. HORNOR,
GUY M. HORNOR,
Of Counsel for Defendant and Appellee.

NEW ORLEANS, April 18, 1892.

A. W. HYATT STATIONERY MANUFACTURING CO., LTD.—59,468.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

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SAMUEL S. BROWN AND HARRY BROWN,
CLAIMANTS OF THE STEAMTUG CORSAIR.

Appeal from the United States Circuit Court for the Eastern District of Louisiana.

BRIEF FOR CLAIMANTS.

I.

The death, for which damages are claimed in this suit, occurred on the 13th of April, 1887, and on the 5th day of April, 1888, this suit was instituted *in rem* against the tug Corsair, and she was seized, and the next day her owners, Samuel S. Brown and Harry Brown, of Pittsburg, Pennsylvania, obtained her release on bond, and then afterwards appeared and excepted to the jurisdiction of the court—pp. 1 to 5.

On the 14th of May, 1888, judgment was rendered sustaining the exception to the extent of releasing the tug from the seizure made under the admiralty warrant in this case, but by the same decree the libellants were allowed to amend their

pleadings and proceed *in personam* against the owners of the vessel, if they saw fit (p. 6). *Therefore, there was no proceeding* IN PERSONAM *up to that time.*

On the 15th of May, 1888, a so-called amended libel *in personam* was filed against the said owners, without any affidavit or any new allegations, or *any specific charges against claimants personally*, and an order was obtained from the District Court ordering attachment process to issue, under which the tug Corsair was again seized and again bonded by its owners.—p 6.

The judgment of the District Court sustaining the exception to the libel *in rem* having been acquiesced in by the libellants, by the filing of their so-called amended libel, there was no question on the appeal to the Circuit Court, and therefore can be no question before this Court on this appeal, as to the correctness of the judgment of the District Court maintaining that exception, which was based upon the opinion of this Court in the case of the Harrisburg, 119 U. S. 199.

See also the Alaska, 130 U. S. 209.

The North Cambria, 40 Fed. Rep. 656.

II.

To the so-called amended libel these claimants have filed four exceptions :—p 11.

First. That due and sufficient process has not been served on them, or upon any one in their behalf, duly authorized to receive the same, sufficient to oblige them to appear and answer to the complaint made in the libel and amended libel filed by the libellants in this case.

We submit that before the attachment process could issue in this case, that a citation should have been issued and served upon the defendants; or, due proof have been made that the defendants could not be found and that they did not have a duly authorized agent to receive service of the same within the jurisdiction of the court, under Rule 2 of the Admiralty Rules laid down by the Supreme Court of the United States.

"Rule 2 of the Admiralty Rules of Practice, providing that the mesne process in a suit *in personam* may be a warrant of arrest of the person of the defendant, and, if he can not be found, for an attachment of his goods and chattels, does not authorize an attachment in Alabama, where imprisonment for debt has been abolished."

See Chaisa vs. Conover, 36 Federal Reporter, 334.

Second. That if any legal warrant of arrest issued in this case, which is denied, against the property of these appearers, the same has so issued for a sum exceeding five hundred dollars and the same had no right to so issue, because there was no affidavit or other proper proof showing the propriety thereof, as is required by *Rule 7* of the Admiralty Rules for the Courts of the United States, laid down by the Supreme Court of the United States.

The only process of the court issued upon the amended libel is that of attachment, and this was issued without any affidavit having been made.

Rule 7 of the Admiralty Rules of the Supreme Court provides that: "In suits *in personam* no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars ($500), unless by special order of the court, upon affidavit or other proper proof showing the propriety thereof." Therefore the attachment process issued in this case is null on its face. We contend that this omission can not be cured by amendment, and although such an amendment was allowed upon the hearing of this exception, it could not date back so as to validate the attachment process.

Third. That proceedings *in rem* and *in personam* can not be joined in the same libel in a case of this character, and hence there was no power in the Court to allow the libellants to change this suit from a suit *in rem* to a suit in *personam;* and that the same is contrary to the Supreme Court Rules in Admiralty.

In the case of the Young America, 1 Brown Admiralty Reports, p. 462, it is held that the libel *in rem* cannot be changed into a libel *in personam* against the owner. See also the Volante, 1 W. Robinson, 383.

Fourth. That the cause of action set forth in the original and amended libels is barred by the prescription of one year, as appears upon the face of said libels and according to the law of the State of Louisiana.

The action for which damages are claimed having occurred on the 13th of April, 1887, as alleged in the original libel, and the amended libel not having been filed until the 15th of May, 1888, when for the first time the defendants are brought into court, the action is clearly prescribed under the authority of Article 2315,* of the Civil Code of Louisiana and the decision of the Supreme Court of the United States, in the case of the Harrisburg, 119 U. S., p. 199.

But it is claimed by the libellants that the prescription now pleaded by the personal defendants herein was interrupted by the proceedings under the original libel *in rem;* but we contend that a proceeding *against our boat* was not a proceeding against the persons claiming same, and, therefore, no interruption of the prescription as to them.

It is provided by Article 3518 of the Civil Code, that: "A legal interruption takes place when the possessor has been *cited* to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not."

"A legal interruption of prescription spoken of in the Civil Code takes place only when the debtor has been cited." See Tanner vs. King, 10 An. 485.

Proceedings *in rem* have been judicially found to have been null and void, the court having no jurisdiction over the same, as has been decided in this case; such proceedings being null can

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C. C. 2315.—Every act, whatever, of man, that causes damage to another, obliges him by whose fault it happened, to repair it; the right of this action shall survive in case of death, in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, *for the space of one year from the death.* The survivors above mentioned may also recover the damages sustained by them by the death of the parent, or child, or husband, or wife, as the case may be.

not interrupt prescription. "A citation judicially held to be absolutely null is not sufficient to interrupt prescription running in favor of a defendant." See Bertrand vs. Knox, 39 An. 431.

"It is necessary that a party *should be cited;* and it can not be controverted that any other means of knowledge of the proceedings instituted against him, brought home to the party against whom the prescription is sought to be legally interrupted, would not be sufficient to operate *as a legal interruption* in a true sense of the law." See Hill vs. Barlow, 6 Robinson, 146, foot of page.

"Although a party be arrested and held to bail, service of the petition and citation can not be dispensed with. Knowledge of the suit, on the part of the defendant, no matter how clearly it can be brought home to him, will not suffice if this formality has not been pursued." See Wall vs. Wilson, 2 La. 169.

"Where a non-resident is held to bail, or leaves the State before *service of the petition* is made on him, the suit will be dismissed; service of both citation and petition is necessary to bring a party into court to answer." See Slocomb vs. Rouy, 13 La. 10.

"An omission to serve the petition and citation on the defendant is not cured by service of a writ of arrest; nor can the appearance of the defendant by counsel, on a motion to set aside the arrest, be considered a waiver of service of citation and petition, nor as authorizing the presumption of an acknowledgment of such service." See Jacobs vs. Sartorius, 3 An. 9.

"The judgment against Brashear was a nullity for want of citation, and was adjudged null. We are unable to understand how such a judgment can be considered as suspending prescription, until its nullity is judicially declared. The decree by which it was declared void, ascertained but did not declare its nullity." See Dwight vs. Brashear, 5 An. 551.

See McCan vs. Connery, 12 Federal Reporter, 315.

The judge of the District Court sustained the plea of pre-

scription and dismissed this case under the following authorties:

"A bill filed in 1808 for the purpose of obtaining the legal title to lands in Kentueky, and afterwards new parties were made defendants in an amended bill filed in 1815. Until these parties had so become defendants and parties to the bill, the suit can not be considered as commenced against them. The statute of limitations will avail the new defendants at the period when the amended bill was filed, and they are not to be affected by the proceeding during the time they were strangers to it."—See Miller vs. McIntyre, 6 Peters, 61.

"A count in the declaration in an ejectment, on a demise from a different party, asserting a different title, is not distinguishable, so far as respects the Act of Limitations, from a new action." See Sicard vs. Davis, 6 Peters, 125.

III.

The proceedings *in rem* against our *boat* should not be considered as an interruption of prescription against *us*, for the further reason, that there is not a single allegation in the libel *in rem* charging us with any *fault* or *liability;* and there is no allegation in the amended libel against us *in personam*, except what are averred against our boat in the original libel *in rem;* and although it is alleged, and not denied, that we were the owners of the boat at the time of the filing of both libels, *there is nowhere in the record any allegation that we were owners of the boat when the damages complained of occurred;* nor any averment *why* we should be held liable for said damages.

We pray that the judgment of the lower court may be affirmed with costs.

Respectfully submitted,

JOSEPH P. HORNOR,

GUY M. HORNOR,

Of Counsel for Defendant and Appellee.

NEW ORLEANS, April 18, 1892.